

*In the Matter of David Aristizabal, Mark Gorman, and David Napolitano*  
DOP Docket No. 2005-4610  
**(Merit System Board, decided August 9, 2006)**

The City of Pleasantville (City) requests relief on behalf of David Aristizabal, Mark Gorman, and David Napolitano, Police Officers with the City.

By way of background, on November 2, 2004, the voters of the City voted to adopt the provisions of Title 11A of the New Jersey Statutes. *See N.J.S.A. 11A:9-1, et seq.* Subsequently, the Department of Personnel's Division of Human Resource Management (HRM) conducted classification surveys to analyze the duties and responsibilities of incumbent employees in the City and determine their proper job title classifications. By letters dated April 18, 2005, HRM informed David Aristizabal, Mark Gorman and David Napolitano that their positions of Police Recruits were properly classified as Police Officers in the competitive division of the career service. However, HRM noted that *N.J.S.A. 11A:9-9* provides that only employees with at least one year of continuous service in their career service title prior to the adoption of Title 11A of the New Jersey Statutes are granted permanent status upon the adoption. Gorman had only been employed in his position since January 9, 2004, and Aristizabal and Napolitano had been employed since May 28, 2004 and May 24, 2004, respectively. Thus, in accordance with *N.J.S.A. 11A:9-9*, HRM determined that these employees were considered to be serving provisionally in the title of Police Officer, pending the certification of available eligible lists for the title.

In response, the City filed the instant request for Merit System Board review. While the City does not take issue with the classification of these employees' positions as Police Officers, it challenges their status as provisional employees. The City specifically requests that the Board relax the provisions of *N.J.S.A. 11A:9-9* and grant permanent status to these three employees. In support, the City notes that all three Police Officers were required to pass an examination developed and administered by the City's Police Chief and they were appointed according to the score they achieved on that examination. The City notes that this examination was developed in accordance with highly recognized and recommended sources. Moreover, these three employees were required to successfully complete training with a Police Academy certified by the Police Training Commission, and this training entailed a significant investment for the City. As such, the City argues that, if it is required to appoint from existing eligible lists and displace these three incumbents, it will effectively lose the tax dollars invested in training these officers. Finally, the City contends that *N.J.S.A. 11A:9-9.1*, which grants permanent career service status to Fire Fighters and Fire Chiefs with less than one year of continued employment prior to the adoption of Title 11A, should be similarly applicable in the instant scenario. In this regard, the City asserts that, like the employees who are

the subject of *N.J.S.A.* 11A:9-9.1, the Police Officers here “underwent similar meritorious systems” prior to being hired into their positions.

Upon receipt of the instant request, staff of the Division of Merit System Practices and Labor Relations solicited further information regarding the City’s hiring process prior to adopting Title 11A. Specifically, detailed information was requested regarding the subject areas in which the incumbents were tested, how the examinations were developed, how many candidates were tested, how the passing point for the examination was determined, and how final selections were made out of the successful candidates.

In response, the appointing authority indicates that Aristizabal and Napolitano were administered a three-part examination. The first part, the written component, was developed utilizing common reference materials for law enforcement examinations and covered 12 topic areas, including, *inter alia*, sentence ordering, traffic maps, matching sketches, mathematics, police policy, letter and number recall, and judgment. Of the 250 candidates, 56 answered 70% of the questions correctly and, thus, passed the written portion of the examination. Candidates who were successful on the written examination were then administered a three-part physical test, which tested their aerobic capacity, flexibility, and muscular endurance. A list of 53 successful candidates was generated with City residents listed first in the order of their scores and County residents listed next in the order of their scores. Aristizabal and Napolitano appeared second and third, respectively, on the County resident list behind 10 City residents. Two City residents were hired, and one City resident withdrew from the selection process. The County resident who ranked first was hired by another jurisdiction. The remaining seven City residents on the list were “disqualified” from the selection process based on their performance in the interview. With regard to Gorman, the appointing authority notes that “he states that he never took a test, that he was hired after an interview with the Chief of Police.”

It is noted that the Law Enforcement Examination (LEE) was announced with a closing date of March 31, 2006, and the examination is currently being administered. Gorman, who is not a resident of the City, did not file for the LEE.

## CONCLUSION

*N.J.S.A.* 11A:9-9 provides:

Any employee of a political subdivision who, at the time of adoption of this title, was actively employed by the political subdivision continuously for a period of at least one year prior to the adoption of this title, or any employee who was on an approved leave of absence and had at least one year of continuous service with the political

subdivision prior to the adoption of this title, and who comes within the career service, shall continue to hold such position, and shall not be removed except in accordance with the provisions contained in this title.

The Legislature's aim in adopting this provision was "[to limit] the opportunities of those in authority to subvert the objectives of the [Civil Service Act] through the dismissal of uncooperative employees and the 'midnight' appointments of spoils system favorites." *Town of Hammonton v. Civil Service Commission*, 82 N.J. Super. 64, 71 (App. Div. 1964).

In the instant matter, the City urges the Board to relax the provisions of N.J.S.A. 11A:9-9 and grant permanent status to Aristizabal, Gorman and Napolitano, despite the fact that they had less than one year of continuous service as of the date of adoption of Title 11A in November 2004. Initially, the Board lacks the authority to relax the statutory requirements of N.J.S.A. 11A:9-9. *See Borough of Park Ridge v. Salimone*, 21 N.J. 28, 46 (1956); *See also Mesghali v. Bayside State Prison*, 334 N.J. Super. 617 (App. Div. 2000), *cert. denied*, 167 N.J. 630 (2001); *Murphy v. Department of Civil Service*, 155 N.J. Super. 491, 493 (App. Div. 1978). However, the City emphasizes that granting permanent status in this instance would be consistent with the spirit and purpose of Title 11A, since the City utilized a similar examination and selection procedure prior to the hiring of two of these employees. Specifically, the City has detailed the examination and selection process utilized when Aristizabal and Napolitano were hired in May 2004. Although the City's process differed somewhat from that utilized by the Department of Personnel, the Board is satisfied that the selection process was consistent with the aims of the Merit System, *i.e.*, selection and advancement based on one's merit and fitness for a position, and that political considerations did not play a role in the selection of Aristizabal and Napolitano. Based on their merit-based appointments, the Board finds that it would be consistent with the Legislature's aims, under these limited circumstances, to grant Aristizabal and Napolitano permanent status in the title of Police Officer with a permanent appointment date of May 28, 2004 and May 24, 2004, respectively.

With regard to Gorman, the Board is unable to grant a similar remedy. The record reflects that Gorman did not take an examination prior to his appointment, and there is no information available regarding how he was selected for appointment. Thus, the Board cannot conclude that granting a permanent appointment would be consistent with N.J.S.A. 11A:9-9. Nevertheless, given the unique circumstances presented, the Board finds that a remedy is warranted. The purpose of N.J.S.A. 11A:9-9 is to ensure that appointments in political subdivisions that adopt the provisions of Title 11A are effected in accordance with the goals of the merit system. N.J.S.A. 11A:9-9 is not intended to completely deprive employees appointed within the one-year time period of any opportunity to demonstrate their

merit and fitness for the position they hold. Gorman commenced employment with the City in January 2004. Because he was seeking employment and was hired as a law enforcement officer in a jurisdiction that was not yet governed by Title 11A, he had no reason to apply for and take an examination that was offered by the DOP prior to November 2004. While it is not clear from the record why he did not apply for the LEE which closed in March 2006, he was aware at that time that the City had filed for relief on his behalf. As such, the Board finds good cause to relax the provisions of *N.J.A.C. 4A:4-2.9(c)* to permit Gorman to take a make-up LEE and compete for the opportunity to achieve permanency in his position. The Board also finds it appropriate to permit the provisional appointment of Gorman to continue until such time as he has had the opportunity to take the LEE, his examination is scored, and his name certified to the City for appointment, if appropriate.

## **ORDER**

Therefore, it is ordered that the appointments of David Aristizabal and David Napolitano be recorded as permanent appointments, effective May 28, 2004 and May 24, 2004, respectively.

It is further ordered that the provisions of *N.J.A.C. 4A:4-2.9(c)* be relaxed in order to permit Mark Gorman to take a make-up Law Enforcement Examination (S9999H).

This is the final administrative determination in this matter. Any further review should be pursued in a judicial forum.